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FILED VIA ECFS

EX PARTE

March 17, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW B-204
445 12th Street, S.W.
Washington, DC 20554

RE: WC Docket No. 04-223, Qwest Corporation Petition for Forbearance in the Omaha Metropolitan Statistical Area

Dear Ms. Dortch:

This letter responds to a recent *ex parte* submission by McLeod Telecommunications Services, Inc. ("McLeod") regarding its Motion for Stay of the Federal Communications Commission's ("Commission") grant of limited forbearance to Qwest Corporation ("Qwest") in the Omaha Metropolitan Statistical Area ("MSA").[1] Given that McLeod has acknowledged that the *Order* poses no threat of irreparable harm to McLeod, the Commission should deny McLeod's Motion for Stay.

On February 6, 2006, McLeodUSA filed a Motion for Stay of the Commission's *Order* granting Qwest limited forbearance from dominant carrier and incumbent local exchange carrier regulation in the Omaha MSA. Qwest filed a timely opposition on February 10. Action has not been taken on the stay motion, which remains pending.

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[1] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, *Memorandum Opinion and Order*, FCC 05-170, rel. Dec. 2, 2005 ("*Order*" or "*Omaha Order*"), *pets. for review pending sub nom., Qwest Corp. v. FCC*, Nos. 05-1450, *et al.* (D.C. Cir. filed Dec. 12, 2005).

Then, on March 8, 2006, McLeod filed an *ex parte* letter in this docket, a letter which is nothing but a reply to Qwest's opposition. This letter was not served on Qwest, which discovered its existence by means of a routine check of *ex parte* filings on the Commission's web site.[2] There is no reason to consider the letter.

Nevertheless, one matter bears noting: McLeod's stay motion was explicitly and necessarily premised on the assertion that McLeod would suffer irreparable harm absent a stay. McLeod now admits that in light of Qwest's Opposition this key element is missing from its stay position.[3] It also acknowledges that in light of the absence of irreparable harm the issue of likelihood of success on the merits has become moot.[4] Nevertheless, McLeod does not withdraw its stay motion.

Instead, McLeod now asks for a ruling that Qwest cannot back-bill McLeod for debts which it incurs for DS0 loops that it uses for its services between March 16, 2006 and the date on which an appropriate and reasonable price is established, consistent with the *Order* -- in effect, asking for reconsideration of the *Order* itself beyond the 30-day statutory deadline.[5]

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[2] The March 8, 2006 letter was procedurally improper and is contrary to the prohibition against the filing of replies to stay petitions, which states that replies to stay petitions "should not be filed" and specifically advises those who transgress and file anyway that their errant filings "will not be considered." 47 C.F.R. § 1.45(d). Even if McLeod could somehow characterize its filing as something other than a "reply to opposition" to "a request for stay," an impossible task, its filing would still have been three weeks late. *See* 47 C.F.R. § 1.45(c). The March 8, 2006 letter referenced WC Docket No. 04-233, which is not the correct docket number for the instant proceeding. On March 10, 2006, McLeod re-filed essentially the same letter in WC Docket No. 04-223, which is the correct docket number. Subsequent references herein by Qwest are to the McLeod Letters.

[3] "[I]t is not likely that McLeodUSA will experience irreparable harm on March 16 or during the course of the appeal." McLeod Letters at 3. McLeod premises the absence of irreparable harm on Qwest not back-billing to March 16, *see id.*, but in fact the absence of irreparable harm does not depend on which price is charged. It is well established that mere economic harm resulting from such price differences does not constitute irreparable harm. *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) ("[E]conomic loss does not, in and of itself, constitute irreparable harm."); *id.* ("'Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.'") (*quoting Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958)).

[4] McLeod states that the question of whether it will prevail on appeal is "no longer relevant" to the motion. *See* McLeod Letters at 3.

[5] *See* 47 U.S.C. § 405(a). Such a petition would have deprived the Court of jurisdiction over McLeod's pending appeal of the *Omaha Order. See BellSouth Corp. v. FCC*, 305 U.S. App. D.C. 134, 17 F.3d 1487, 1489 (D.C. Cir. 1994); *Wade v. FCC*, 300 U.S. App. D.C. 84, 986 F.2d

Commission action is requested through McLeod's letter even though neither McLeod nor any other local exchange carrier has been billed, and even though McLeod avows that it "has no intention of paying any such back-billed charges."[6] The harm that McLeod now asserts -- but does not claim to be irreparable harm -- seems to be McLeod's fear that (1) Qwest will back-bill McLeod for the lawful amount in accordance with the Commission's *Order* (although no one currently knows what that amount is), (2) McLeod will refuse to pay that amount, (3) Qwest will sue McLeod, and (4) Qwest will win its lawsuit. Based upon this four-layered speculation, McLeod asserts that it "need[s] to implement price increases for its wholesale and retail customers to recover these significantly higher charges" and that it has "already notified its largest customers in the market of price increases absent a stay."[7]

In the context of a stay petition, the admission by the petitioning party of the absence of irreparable harm without an accompanying withdrawal of the petition is unheard of. So, too, is an untimely petition for reconsideration cloaked in the guise of a prohibited reply to an opposition to a stay motion. As though these procedural violations were not enough, McLeod makes things worse by submitting descriptions of Qwest's own position that are completely at odds with what Qwest actually said. For example:

- McLeod claims that "Qwest's response confirms that it does not have a replacement product for DS0 UNE loops. . ."[8] Actually, Qwest's response documented precisely the opposite.[9]

- McLeod claims that "Qwest does not have in place a commercially reasonable ordering process for voice grade DS0 UNE loops."[10] Actually, Qwest's response likewise documented precisely the opposite (pointing out that an alternative product was being developed, and that the existing ordering systems would be continued for both tariffed and commercial products).[11]

1433, 1434 (D.C. Cir. 1993) (*per curiam*); *TeleSTAR, Inc. v. FCC*, 281 U.S. App. D.C. 119, 888 F.2d 132, 133-34 (D.C. Cir. 1989) (*per curiam*).

[6] McLeod Letters at 3.

[7] *Id.* If McLeod's "largest customers" are really so impervious to price changes by McLeod that it can increase its prices in this fashion upon so flimsy an excuse, the market in which McLeod operates is quite different than what Qwest has experienced.

[8] McLeod Letters at 1.

[9] Qwest Opposition, Affidavit of Candace Mowers ¶¶ 9-10.

[10] McLeod Letters at 1.

[11] Qwest Opposition, Affidavit of Candace Mowers ¶ 13.

McLeod's admission that it does not face irreparable harm should remain on the record because it completely undermines the requested relief and is an important admission against interest should McLeod seek a stay from the D.C. Circuit. Obviously, the Commission itself should deny the stay on substantive grounds and not consider the reply except to the extent it bolsters the denial of relief.

Please accept this letter and associate it with the pending docket.

Very truly yours,

/s/ Robert B. McKenna

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